

STATE OF MICHIGAN
COURT OF APPEALS

KAREN MARIE GRAMS,

Plaintiff-Appellee,

v

ROBERT JAMES GRAMS,

Defendant-Appellant.

UNPUBLISHED

December 18, 2014

No. 322697

Oakland Circuit Court

Family Division

LC No. 2007-729584-DM

Before: O’CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court’s order denying his motion to change custody and awarding plaintiff attorney fees. For the reasons stated below, we affirm in part and reverse in part.

The parties divorced in August of 2007. Plaintiff was awarded sole legal and physical custody of their minor child. On June 18, 2014, defendant filed a motion to change the custody, which the trial court denied after finding that defendant had failed to establish proper cause or a change of circumstances.

Defendant first argues that the trial court erred in finding that he failed to establish proper cause or a change of circumstances to warrant reconsideration of the previous custody order. “Under the Child Custody Act, MCL 722.21 *et seq.*, ‘all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.’ ” *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting MCL 722.28. A party seeking a change in custody must first establish proper cause or a change of circumstances as a precondition to the trial court’s reconsideration of the established custodial environment and best-interests factors. *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011); MCL 722.27(1)(c). To establish proper cause, “a movant must prove by a preponderance of the evidence the existence of an appropriate ground(s) for legal action to be taken by the trial court. The appropriate ground should be relevant to at least one of the twelve statutory best interest factors, and must be of such a magnitude to have a significant effect on the child’s well-being.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 512, 514; 675 NW2d 847 (2003). “[I]n order to establish a ‘change of circumstances,’ a movant must prove that, since the

entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original).

Here, defendant failed to establish by a preponderance of the evidence the existence of proper cause or a change of circumstances. He argued that a change of custody was warranted because the minor child had expressed a preference to live with him during the school year. Defendant asserted that the minor child told him that there was substantial alcohol consumption in plaintiff's home, that plaintiff's new husband was mean and mentally abusive to the minor child, that the minor child had to share a room with his 22-year-old stepsister, and that the minor child was frequently home alone because no one in the family would do anything with him. Defendant's attorney also interviewed the minor child and averred to the trial court that the child had a strong preference to live with defendant during the school year. However, these allegations, standing alone, did not establish a proper cause or a change of circumstances sufficient to warrant revisiting the previous custody order. First, because a child's preference is one of the best interest factors,¹ a child's preference can constitute proper cause to revisit a custody decision; however, a movant must also show that the ground is "of such magnitude to have a significant effect on the child's well-being." *Vodvarka*, 259 Mich App at 512. Here, defendant has not pointed to any specific, significant effects that living with plaintiff has had on the minor child's well-being. Instead, defendant's allegations are vague and generalized. He did not quantify what a "substantial amount" of alcohol is or how the consumption of alcohol is affecting the minor child. He offered no examples of how the minor child's stepfather is mean or mentally abusive to the minor child. Likewise, he offered no facts showing how the minor child was negatively affected by sharing a room with his stepsister. Further, although defendant alleges the minor child is being left alone for "substantial" periods of time, he does not provide any examples or explain the significant effect it may have on the minor child. Next, in addition to not specifying any negative impact on the minor child's well-being, defendant expressly stated that the minor child was doing well in school, which appears to indicate that the child's well-being was not significantly affected by the allegations in defendant's motion.

Additionally, while the minor child may now prefer to live with his father, it is normal that a child's preferences will change as he grows older. However, a sufficient demonstration of a change in circumstances requires the movant to "demonstrate something more than the normal life changes (both good or bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-514. "[O]ver time there will always be some changes in a child's environment, behavior, and well-being." *Id.* at 513. Defendant must show a material change which has or will have a significant effect on the minor child's well-being. *Id.* Consequently, although the minor child may be a mature, articulate 12-year-old boy, the trial court did not err in wanting more than his preference and defendant's broad statements to conclude that there was proper cause or a change of circumstances.

¹ MCL 722.23(i).

Defendant next argues that the trial court violated his substantive due process rights when it refused to consider the minor child's preference while deciding whether to conduct a best-interest hearing. In support of his argument, defendant cites *Stringer v Vincent*, 161 Mich App 429, 434; 411 NW2d 474 (1987); however, *Stringer* is inapposite to the case at hand. In *Stringer*, this Court did not even discuss the parent's due process rights, much less hold that the court's failure to consider a child's preference violated the parent's due process rights. Instead, this Court held that the trial court erred in deciding the children's best interests without interviewing the children or holding an evidentiary hearing. *Id.* at 434. Because defendant cites no applicable case law to support his argument that the court's alleged failure to consider the minor child's preference implicated *defendant's* due-process rights, he has waived that argument. "When a party merely announces a position and provides no authority to support it, we consider the issue waived." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Finally, defendant argues that the trial court abused its discretion in awarding plaintiff \$500 in attorney fees. Plaintiff asked for attorney fees in her response to defendant's motion, arguing that defendant's motion was without a legal or factual basis. In granting plaintiff's request for attorney fees, the trial court stated that it found defendant's actions to be "very underhanded" because during visitation with the minor child defendant had a lawyer interview the minor child and then filed a motion for a change of custody.

We review a trial court's decision to grant attorney fees to a party for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Id.* at 164 (citations omitted). "Under the 'American rule,' attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Id.* In this case, the trial court did not specify what statutory ground, court rule, or common law principle it relied on in awarding plaintiff attorney fees. However, plaintiff asked for attorney fees based on "having to defend against a motion that is without factual or legal basis." Accordingly, it appears that the court based its grant of attorney fees on MCL 600.2591.

Under MCL 600.2591, if a trial court finds that a civil action was frivolous, the court shall award the prevailing party all reasonable costs, including reasonable attorney fees. Under MCL 600.2591(3)(a), an action is frivolous if one of the following is true:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
- (iii) The party's legal position was devoid of arguable legal merit.

First, it is apparent that defendant had a reasonable basis to believe the facts underlying his legal position were true because the facts were based on statements attributed to the minor child, who was interviewed by defendant's attorney and spoke to defendant. Next, because the child

expressed a preference to live with defendant and because there were other concerns that could potentially affect the well-being of the minor child, the legal threshold for a motion to change custody set forth in *Vodvarka* could have arguable been satisfied as well. Finally, there is nothing on the record indicating that defendant's primary purpose was to harass, embarrass, or injure plaintiff. Instead, it appears from the motion that defendant was genuinely concerned for his son's welfare. According to defendant, the minor child had been expressing his desire to live with defendant for more than a year. Further, defendant raised other concerns with the minor child's living situation apart from the child's preference, including the use of alcohol in plaintiff's home, alleged mental abuse by plaintiff's husband, and potential neglect in leaving the child alone. Although defendant's allegations were ultimately insufficient to constitute proper cause or a change of circumstances to reconsider the current custody arrangement, the failure to prevail on an action does not mean the action was frivolous. See *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486-487; 760 NW2d 526 (2008).

Affirmed in part and reversed in part.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher